IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

#8 Appeal Brief 2/12/03

APPLICATION NO.:	09/782,782
FILED:	February 13, 2001
APPLICANTS:	Christopher Cavallaro, Ryan W. Bosanko, and Edmund A. Hebert
TITLE:	THIN-LAYER-COVERED MULTI-LAYER GOLF BALL
GROUP ART UNIT:	3711
EXAMINER:	Alvin Hunter
ATTY. DOCKET NO.:	B01-07

Ex parte Cavallaro *et al.*
Appeal No. _____

BRIEF ON APPEAL

Troy R. Lester
Patent Counsel
Acushnet Company
333 Bridge Street
Fairhaven, MA 02719
(508) 979-3534

INDEX

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BRIEF ON APPEAL UNDER 37 C.F.R. § 1.192

1. REAL PARTY IN INTEREST

The real party and interest in this Application is the Assignee, Acushnet Company, of Fairhaven, Massachusetts.

2. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to Appellants, Appellants' legal representative, or Assignee that will directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

3. STATUS OF CLAIMS

Claims 1-16 and 18-28 are pending and subject to this appeal. Claims 1-6 and 18-28, showing amendments made thereto during prosecution, are attached as Appendix A.

4. STATUS OF AMENDMENTS

The amendments filed on June 18, 2002, in response to the Office Action mailed April 2, 2002, were entered by the Examiner, as noted in the Final Office Action mailed September 10, 2002.

The response to the Final Office Action mailed September 10, 2002 contained no amendments. As such, the claims on appeal are 1-16 and 18-28, as amended on April 2, 2002.

5. SUMMARY OF INVENTION

Referring to FIG. 1, as defined by the presently pending claims and, in particular, independent claims 1 and 18, the invention is generally directed to a golf ball 10 having at least four components, including a core 12 and a cover 14 disposed about the core. The core 12 includes a center 16 and at least one outer core layer 18 adjacent the center 16. The cover 12 includes at least one inner cover layer 22 and an outer cover layer 20. See also Specification at page 12, lines 9-19.

In accordance with the invention, the center has an outer diameter ranging from about 0.375 inches to about 1.4 inches (Specification at page 30, lines 28-29) and deflection of greater than about 4.5 mm under a load of 100 Kg (Specification at page 31, lines 16-17). The outer core layer has an outer diameter ranging from about 1.4 inches to about 1.62 inches (Specification at page 30, lines 30-31). The inner cover layer has an outer diameter of greater than about 1.58 inches (Specification at page 31, lines 1-2) and a material hardness of less than about 72 Shore D (Specification at page 30, lines 22-23). The outer cover layer has a hardness, as measured on the golf ball, of greater than about 50 Shore D (Specification at page 30, line 22), more preferably greater than about 56 Shore D (Specification at page 33, Table II), as measured directly on the golf ball.

It is important to note that there is a fundamental difference between "hardness measured on the golf ball" and "material hardness". Material hardness is defined by the procedure set forth in ASTM-D2240 and involves measuring the hardness of a flat "slab" of material. Hardness, when measured on a golf ball, however, can result in different hardness values due to a number of factors, such as ball construction, ball diameter, and the material composition of adjacent layers. For example, as in claim 1 of the present invention, a golf ball can have a hardness, as measured on the ball, of greater than 56 Shore D *as well as* a material hardness of less than 55

Shore D, as set forth in claim 2. This is because the hardness, when measured on the ball, is influenced by the underlying material, especially if the layer being measured is thin or the inner cover layer is particularly hard. It is in this manner that golf ball performance can be affected in non-conventional ways.

The present invention is primarily directed to a four-component golf ball with *very particular* construction to provide specific and desirable playing characteristics. The combination of a very soft center and a harder outer core layer provide a very-low spin, high-speed core. This core construction, combined with a "not soft" outer cover help provide low driver spin. Control around the green is achieved by an outer cover having a material hardness of less than 55 Shore D, more preferably less than 50 Shore D, even though the hardness, as measured on the ball, is greater than 56 Shore D for low spin. Therefore, this specific combination of low spin and spin control provides a golf ball construction that exhibits low spin and soft feel off the driver, yet still affords control around the green without resorting to a very soft cover.

6. ISSUES

The sole issue on appeal is whether the Examiner has established a *prima facie* case of obviousness under 35 U.S.C. § 103 in rejecting claims 1-16 and 18-28 as being unpatentable over U.S. Patent No. 6,248,027 to Hayashi *et al.* ("Hayashi").

7. GROUPING OF CLAIMS

Claims 1-16 and 18-28 should be reviewed on appeal such that these claims stand or fall together. Appellants' arguments will, therefore, be directed to independent claims 1 and 18.

8. ARGUMENT

Claims 1-16 and 18-28 were rejected under 35 U.S.C. § 103(a) as being obvious over Hayashi as the Examiner set forth in the Final Office action mailed September 10, 2002. The Examiner specifically addressed this rejection on pages 2-3 of the Final Office Action:

> Hayashi *et al.* disclose a multi-piece golf ball, having improved flight distance, hitting feel, and controllability, comprising a solid inner core, outer core, inner cover, and outer cover (See Abstract).

> The inner core has a diameter of 20 to 37mm, a distortion of 3 to 8 mm under a load of 100kg, a Shore D hardness of 20 to 50, and a specific gravity of 1.0 to 1.7 (See Figure 1 and Column 4, lines 1 through 67). The outer core has a diameter of 32 to 41 mm, a Shore D hardness of 40 to 70, and a specific gravity of 0.9 to 1.3 (See Figure 1 and Column 5, lines 1 through 35). The inner cover has a gage of 0.5 to 3mm and a Shore D hardness of at least 55 (See Figure 1). The outer cover has a gage of 0.3 to 3mm and a Shore D hardness of 35 to 53 (See Figure 1). With the inner cover having a gage of 0.3 to 3 mm, the diameter of the inner layer would be from 33 to 47 mm. The golf ball's moment of inertia satisfies the equation (1.52*ball weight + 12.79), in which the ball weights [sic] 44.5 to 45.93 grams (See Abstract). This gives the golf ball a moment of inertia of at least 80.43 g•cm^2. ***Hayashi et al. does not disclose an outer cover having a hardness greater than about 56 Shore D***. A harder inner layer and softer cover is also taught by the applicant within Table II of the present application for the prior art ball labeled as "Control". Furthermore, Hayashi et al. notes that having a hard inner cover and soft outer cover improves the spin performance upon approach shots and improves the hitting feel, and maintains satisfactory flight performance (See Column 5, lines 63 through 67). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have the inner cover hardness higher that the outer cover hardness of any amount in difference in order to optimize the spin performance, hitting feel, and flight performance. (emphasis added).

Appellants respectfully submit that the Examiner has not established a *prima facie* case of obviousness and has, therefore, erred in the rejection of appealed claims 1-16 and 18-28 for the reasons full-developed below.

I. A *Prima Facie* Case Of Obviousness Has Not Been Established

As set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 U.S.P.Q. 459 (1966), factual inquiries must be made to establish a background for determining obviousness under 35 U.S.C. § 103. These factual inquiries include determining the scope and content of the prior art along with the differences that exist between the prior art and the claimed invention. Once these inquiries have been made and this factual background has been established, the law under 35 U.S.C. § 103 requires that a claimed invention be considered "as a whole" in making an

obviousness determination. *Shenck v. Norton Corporation.*, 218 U.S.P.Q. 698 (Fed. Cir. 1983). The burden is on the Examiner to establish a *prima facie* case of obviousness and, until then, the burden does not shift to the Applicant. *In re Bell*, 991 F.2d 781, 783, 26 U.S.P.Q.2d 1529, 1530 (Fed. Cir. 1993).

Considering Appellants' invention as a whole, Hayashi, the sole reference cited, and the supporting arguments made by the Examiner fail to establish a *prima facie* case of obviousness. Hayashi does not disclose or suggest every element of independent claims 1 and 18 and, in fact, *teaches away* from one of the elements of these claims.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, the prior art reference must suggest to one of ordinary skill in the art that they should make the claimed invention. *In re Vaeck*, 947 F.2d 488, 493, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). Second, one of ordinary skill in the art must have a reasonable expectation of success in making the claimed invention based on the revelations contained in the prior art reference. *Id.* Finally, the prior art reference must teach or suggest all the claim limitations. *Id.* The suggestion to make the claimed invention and the reasonable expectation of success in making it must be found in the prior art reference and not in Applicant's disclosure. *Id.*

For at least two of the above reasons, *prima facie* case of obviousness has not been established. First, Hayashi fails to teach or suggest all claim limitations of the present invention, namely an outer cover hardness of greater than about 56 Shore D, as recited in independent claims 1 and 18 of the present invention. This fact is recognized and acknowledged by the Examiner in a variety of places. On page 4 of the Final Office Action, the Examiner admits that "Hayashi *et al.* does not disclose an outer cover having a hardness greater than about 56 Shore D" and on page 2 of the Advisory Action, the Examiner states that Hayashi "prefer[s] that the inner cover be 53 Shor [sic] D or less."

Second, there is no suggestion or motivation in Hayashi to modify the reference because Hayashi *teaches away* from such a modification. Hayashi discloses an outer cover having a hardness of 35 to 53 Shore D and reasons that "with the outer cover made softer in this manner, the spin performance upon approach shots is improved and the hitting feel...and putting becomes soft." U.S. Patent No. 6,248,027 (issued June 19, 2001). Hayashi has the specific purpose of providing spin control while retaining "satisfactory flight performance." *Id.* According to

Hayashi, if the range of 35 to 53 Shore D is not met, proper spin and control cannot be achieved. This hardness range is the only range suggested by Hayashi.

On page 2 of the Advisory Action, the Examiner makes the astonishing statement:

> "Hayashi et al. is ***silent as to why the outer cover cannot be any higher than 53 Shore D***, therefore ***how can the reference teach away from something that it is silent upon***." (emphasis added).

Appellants are dumbfounded on a number of fronts. First, Hayashi expressly states a range for cover hardness. That range is lower than that of Appellants'. Moreover, if Hayashi is silent on cover hardnesses greater than 53 Shore D, as the Examiner admits, an element of Appellants' claims 1 and 18 does not exist in Hayashi and, therefore, cannot be suggested. Finally, based on the above statement, the Examiner's argument appears to be that if a reference fails to teach an element of the claims that the reference still suggests that element through its silence. Therefore, if silence or lack of disclosure in a prior art reference of a particular claim element equates disclosure and suggestion of that element, then every reference that does not teach the claimed invention must suggest the claimed invention through its silence. This is not the law.

The Examiner also states in the Advisory Action, on page 2, that "a specific range does not have to be explicitly taught within a reference", suggesting that, even though Hayashi fails to disclose Appellants' cover hardness of greater than 56 Shore D, this is not a necessary requirement to establish obviousness. Appellants agree that Hayashi does not teach a cover hardness within the range set forth in claims 1 and 18 of the present invention. Appellants, however, disagree with the Examiner's contention that this does not matter. This is simply additional evidence that establishes that the Examiner has failed to make a *prima facie* case of obviousness.

Further, the Examiner contends that because Hayashi discloses that having a hard inner cover and soft outer cover improves the spin performance, hitting feel and maintains satisfactory flight performance, that it would have been obvious to one of ordinary skill in the art to have an inner cover harder than the outer cover – Applicants do not disagree. However, this realization is not sufficient to render the claims of the present invention obvious. Were claims 1 and 18 to stop short of their current state and recite, specifically, that the inner cover is harder than the outer cover, the Examiner might be correct. This is not the case, however, because claims 1 and

18 of the present invention further recite an outer cover having a hardness of greater than 56 Shore D. As set forth above, Hayashi does not teach or suggest at least this element.

Even in cases where a *prima facie* case of obviousness is established, it can be rebutted if Applicants can show that the cited reference, in any material respect, *teaches away* from the claimed invention. *In re Geisler*, 116 F.3d 1465, 43 U.S.P.Q.2d 1362, 1365 (Fed. Cir. 1997) (emphasis added). Hayashi discloses an outer cover hardness substantially below that recited in independent claims 1 and 18 of the present invention and, therefore, *teaches away*, from the claimed hardness. Additionally, a reference may be said to *teach away* when a person of ordinary skill in the art, upon reading the reference, would be led in a direction divergent from the path that was taken by Applicant. *Tec Air, Inc. v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 1360, 52 U.S.P.Q.2d 1294, 1298 (Fed. Cir. 1999). One of ordinary skill in the art, reading Hayashi to determine what cover hardness to use, would not be led in the direction of a cover hardness greater than 56 Shore D. Rather, they would be led (even directed) to use a hardness range of 35 to 53 Shore D. Hayashi specifically teaches that "with the outer cover made softer in this manner, the spin performance upon approach shots is improved and the hitting feel...and putting becomes soft." U.S. Patent No. 6,248,027 (issued June 19, 2001).

The only cited prior art reference, Hayashi, simply does not disclose or suggest the use of an outer cover layer having a hardness, as measured on the golf ball, of greater than 56 Shore D, or convey to those of ordinary skill in the art a reasonable expectation of success in doing so. Moreover, it actually teaches away.

II. Appellants' Disclosure Has Been Incorrectly And Inappropriately Relied Upon

In the Final Office Action, the Examiner incorrectly stated that a harder inner layer and softer cover layer is taught by Applicants in Table II for the ball labeled 'Control' – this is incorrect because no inner cover hardness value is listed. Even assuming *arguendo* that an inner cover hardness were listed, and that it was a value harder than that of the cover, it is well established that the teaching or suggestion to make the claimed modification to the primary reference must be found in the prior art, and not Applicants' disclosure. The Examiner cannot resort to Applicants' own teaching to suggest how to modify the prior art in order to reject

Applicants' claims. *W.L. Gore & Associates, Inc. v. Garlock, Inc.* 721 F.2d 1540, 220 U.S.P.Q. 303 (Fed. Cir. 1983), *cert. denied* 469 U.S. 851 (1984).

III. The Examiner Has Failed To Meet The Required Burden Of Proof

As set out above, it is also well established that the burden is on the Examiner to provide some suggestion of the desirability of doing what the inventors have done. To support the conclusion that the claimed invention is directed to obvious subject matter, the primary reference must either (1) *expressly or impliedly suggest the claimed invention* or (2) the Examiner must present a *convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious* in light of the teachings of the prior art references. *Ex parte Clapp*, 227 U.S.P.Q. 972, 973 (Bd. Pat. App. & Inter. 1985) (emphasis added). Neither of these elements exist here. The Examiner has simply made conclusory assertions without proper foundation.

Moreover, the Examiner must provide evidence that, as a whole, shows that the legal determination sought to be proved (*i.e.*, the reference teachings establish a *prima facie* case of obviousness) is more probable than not. MANUEL OF PATENT EXAMINING PROCEDURE § 2142 (8th ed. 2001). This level of proof has not been established. Not only does the only reference relied upon not teach the claimed invention, it *teaches away* from it. The Examiner has failed to provide any teaching that would suggest changing it.

9. CONCLUSION

In accordance with the authority set forth above, and for the facts and reasons fully developed herein, Appellants respectfully request that the decision of the Examiner be reversed in its entirety.

Respectfully submitted,

Date: February 5, 2003

Troy R. Lester (Reg. No. 36,200)
Acushnet Company
333 Bridge Street
Fairhaven, MA 02719
(508) 979-3534

APPENDIX A: PENDING CLAIMS

What is claimed is:

1. (*Amended in 1st response*) A golf ball comprising a core and a cover disposed about the core, wherein the core comprises a center and at least one outer core layer adjacent the center, and the cover comprises at least one inner cover layer and an outer cover layer;

(a) wherein the center has an outer diameter from about 0.375 in to about 1.4 in and deflection of greater than about 4.5 mm under a load of 100 Kg;

(b) the outer core layer has an outer diameter of from about 1.4 in to about 1.62 in;

(c) the inner cover layer has an outer diameter of greater than about 1.58 in and a material hardness of less than about 72 Shore D; and

(d) the outer cover layer has a hardness of greater than about [50] 56 Shore D.

2. The golf ball of claim 1, wherein the outer cover layer has a material hardness less than about 55 shore D.

3. The golf ball of claim 2, wherein the outer cover layer has a material hardness less than about 50 shore D.

4. The golf ball of claim 1, wherein the inner cover layer material hardness is between about 60 and about 70 Shore D.

5. The golf ball of claim 4, wherein the inner cover layer material hardness is between about 60 and about 65 Shore D.

6. The golf ball of claim 1, wherein the inner cover layer outer diameter is from about 1.59 in to about 1.66 in.

7. The golf ball of claim 6, wherein the inner cover layer outer diameter is from about 1.6 in to about 1.64 in.

8. The golf ball of claim 1, wherein the center outer diameter is from about 0.5 in to about 1.25 in.

9. The golf ball of claim 8, wherein the center outer diameter from about 0.9 in to about 1.2 in.

10. The golf ball of claim 1, wherein the outer core layer outer diameter is from about 1.52 in to about 1.59 in.

11. The golf ball of claim 10, wherein the outer core layer outer diameter is from about 1.535 in to about 1.58 in.

12. The golf ball of claim 1, wherein the ball has a moment of inertia of less than about 83 $g \cdot cm^2$.

13. The golf ball of claim 1, wherein the center has a first hardness, the outer core layer has a second hardness greater than the first, and the inner cover layer has a third hardness greater than the second.

14. The golf ball of claim 13, wherein the outer cover layer has a fourth hardness less than the third hardness.

15. The golf ball of claim 1, wherein the center has a first specific gravity and the outer core layer has a second specific gravity that differ by less than about 0.1.

16. The golf ball of claim 1, wherein the center is solid.

17. *Cancelled in 1st response*

18. (*Amended in 1st response*) A golf ball comprising a core and a cover disposed about the core, wherein the core comprises a solid center and an outer core layer adjacent the center, and the cover comprises an inner cover layer and an outer cover layer;

(a) wherein the center has an outer diameter from about 0.375 in to about 1.4 in and deflection of greater than about 4.5 mm under a load of 100 Kg;

(b) the outer core layer has an outer diameter of from about 1.4 in to about 1.62 in;

(c) the inner cover layer has an outer diameter of greater than about 1.58 in and a material hardness of less than about 72 Shore D; and

(d) the outer cover layer has a hardness of greater than about [50] 56 Shore D.

19. The golf ball of claim 18, wherein the outer cover layer has a material hardness of less than about 50 and a thickness of less than about 0.035 in.

20. The golf ball of claim 18, wherein the center has a first hardness, the outer core layer has a second hardness greater than the first, and the inner cover layer has a third hardness greater than the second.

21. The golf ball of claim 20, wherein the outer cover layer has a fourth hardness less than the third hardness.

22. The golf ball of claim 18, wherein the inner cover layer outer diameter is from about 1.59 in to about 1.66 in.

23. The golf ball of claim 22, wherein the inner cover layer outer diameter is from about 1.6 in to about 1.64 in.

24. The golf ball of claim 18, wherein the center outer diameter is from about 0.5 in to about 1.25 in.

25. The golf ball of claim 24, wherein the center outer diameter from about 0.9 in to about 1.2 in.

26. The golf ball of claim 18, wherein the outer core layer outer diameter is from about 1.52 in to about 1.59 in.

27. The golf ball of claim 18, wherein the ball has a moment of inertia of less than about 83 $g \cdot cm^2$.

28. The golf ball of claim 18, wherein the center has a first specific gravity and the outer core layer has a second specific gravity that differ by less than about 0.1.

FEE TRANSMITTAL for FY 2003

Patent fees are subject to annual revision.

TOTAL AMOUNT OF PAYMENT	($) 320.00

Complete if Known	
Application Number	09/782,782
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First Named Inventor	Christopher Cavallaro
Examiner Name	Alvin Hunter
Group Art Unit	3711
Attorney Docket No.	B01-07

METHOD OF PAYMENT

☑ Deposit Account:

Deposit Account Number: 502309
Deposit Account Name: Acushnet Company

The Commissioner is authorized to: *(check all that apply)*

☑ Charge fee(s) indicated below ☑ Credit any overpayments

☑ Charge any additional fee(s) during the pendency of this application

☐ Charge fee(s) indicated below, **except for the filing fee**

to the above-identified deposit account.

FEE CALCULATION

1. BASIC FILING FEE

Large Entity

Fee Code	Fee ($)	Fee Description	Fee Paid
1001	750	Utility filing fee	
1002	330	Design filing fee	
1004	750	Reissue filing fee	
1005	160	Provisional filing fee	

SUBTOTAL (1) ($)

2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE

			Extra Claims		Fee from below		Fee Paid
Total Claims		- 20** =		×	18	=	
Independent Claims		- 3** =		×	84	=	

Large Entity

Fee Code	Fee ($)	Fee Description
1202	18	Claims in excess of 20
1201	84	Independent claims in excess of 3
1204	84	**Reissue independent claims over original patent
1205	18	**Reissue claims in excess of 20 and over original patent

SUBTOTAL (2) ($)

**or number previously paid, if greater; For Reissues, see above

FEE CALCULATION (continued)

3. ADDITIONAL FEES

Large Entity

Fee Code	Fee ($)	Fee Description	Fee Paid
1051	130	Surcharge – late filing fee or oath	
50	50	Surcharge – late provisional filing fee or cover sheet	
1053	130	Non-English specification	
1812	2,520	For filing a request for *ex parte* reexamination	
1804	920*	Requesting publication of SIR prior to Examiner action	
1805	1,840*	Requesting publication of SIR after Examiner action	
1251	110	Extension for reply within first month	
1252	410	Extension for reply within second month	
1253	930	Extension for reply within third month	
1254	1,450	Extension for reply within fourth month	
1255	1,970	Extension for reply within fifth month	
1401	320	Notice of Appeal	
1402	320	Filing a brief in support of an appeal	320
1403	280	Request for oral hearing	
1451	1,510	Petition to institute a public use proceeding	
1452	110	Petition to revive – unavoidable	
1453	1,300	Petition to revive – unintentional	
1501	1,300	Utility issue fee (or reissue)	
1502	470	Design issue fee	
1460	130	Petitions to the Commissioner	
1807	50	Processing fee under 37 CFR 1.17(q)	
1806	180	Submission of Information Disclosure Stmt	
8021	40	Recording each patent assignment per property (times number of properties)	
1809	750	Filing a submission after final rejection (37 CFR 1.129(a))	
1810	750	For each additional invention to be examined (37 CFR 1.129(b))	
1801	750	Request for continued Examination (RCE)	
1802	900	Request for expedited examination of a design application	
1814	110	Statutory Disclaimer	
Other fee	(specify)		

*Reduced by Basic Filing Fee Paid SUBTOTAL (3) ($) 320

SUBMITTED BY

Name	Troy R. Lester	Registration No. 36,200	
Address	Acushnet Company, 333 Bridge St., Fairhaven, MA 02719	Telephone	508-979-3534
Signature		Date	February 5, 2003

02-06-03

AF/3700

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TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Application Number	09/782,782
Filing Date	February 13, 2001
First Named Inventor	Christopher Cavallaro
Art Unit	3711
Examiner Name	Alvin Hunter
Attorney Docket Number	B01-07

Total Number of Pages in This Submission

ENCLOSURES (*Check all that apply*)

- ☐ Fee Transmittal Form
  - ☐ Fee Attached
- ☐ Amendment/Reply
  - ☐ After Final
  - ☐ Affidavits/declaration(s)
- ☐ Extension of Time Request
- ☐ Express Abandonment Request
- ☐ Information Disclosure Statement
- ☐ Certified Copy of Priority Document(s)
- ☐ Response to Missing Parts/ Incomplete Application
  - ☐ Response to Missing Parts under 37 CFR 1.52 or 1.53
- ☐ Drawing(s)
- ☐ Licensing-related Papers
- ☐ Petition
- ☐ Petition to Convert to a Provisional Application
- ☐ Power of Attorney, Revocation Change of Correspondence Address
- ☐ Terminal Disclaimer
- ☐ Request for Refund
- ☐ CD, Number of CD(s) _____
- ☐ After Allowance Communication to Group
- ☐ Appeal Communication to Board of Appeals and Interferences
- ☒ Appeal Communication to Group **(Appeal Notice, Brief, Reply Brief)**
- ☐ Proprietary Information
- ☐ Status Letter
- ☐ Other Enclosure(s) (please Identify below):

Remarks

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm or Individual	Troy R. Lester
Signature	, 36,200
Date	February 5, 2003

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Typed or printed	~~Troy R. Lester~~		
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